State of Michigan
Supreme Court

Appeal from the Michigan Court of Appeals
Owens, P.J., and Bandstra and Murray, J.J.

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Plaintiff-Appellee,

Supreme Court No. 124765

Court of Appeals
No. 234099

v

HAGGERTY CORRIDOR PARTNERS LIMITED PARTNERSHIP, a Michigan Limited Partnership, and PAUL D. YEGER, TRUSTEE a/k/a PAUL D. YEGER and NEIL J. SOSIN,

Oakland County Circuit
Court No. 95-509518-CC

Defendants-Appellants.
_____/

BRIEF OF PLAINTIFF-APPELLEE
MICHIGAN DEPARTMENT OF TRANSPORTATION

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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

Appellee, Michigan Department of Transportation, accepts the Appellants' Statement of the Basis of Appellate Jurisdiction.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

Appellee, Michigan Department of Transportation, accepts the Appellants' Statement of the Questions Presented, insofar as the first question, but submits the following counter-statement of the second question:

II. Was the Court of Appeals decision in this case consistent with *DOT v Van Elslander*, 460 Mich 127; 594 NW2d 841 (1999)?

COUNTER-STATEMENT OF FACTS

As required by MCR 7.306(A) and MCR 7.212(D)(3)(b), this Counter-Statement of Facts will point out the inaccuracies and deficiencies in the Statement of Facts, insofar as those facts provided by Appellants, Haggerty Corridor Partners Ltd Partnership (Owners) in their Brief on Appeal to this Court (Brief) are material to the issues on appeal.

A great deal of what is asserted in the Statement of Facts, however, is argumentative and apparently intended to portray an overwhelming factual case for the imminence and certainty of rezoning. While Appellee, Michigan Department of Transportation (MDOT) disputes that portrayal, the details are not material to this appeal. This appeal presents questions of law – it is for the jury to determine the facts, after a fair trial. Rulings of the trial court, however, denied MDOT a fair trial, as this brief will describe.

As to those facts that are material to this appeal – specifically in regard to the jury view and cost-to-cure issues – MDOT will show that the Owners' representation of them cannot withstand scrutiny. (The same factual errors were made in the Owners' Application for Leave Appeal to this Court, and they were pointed out in MDOT's Brief in Response, pp 22-23, 39)

The Owners contend that admission of the post-taking rezoning evidence was harmless error because, during its view of the property, the jury saw that it had already been developed as an office park – with the implication that it had also been rezoned. That representation is not supported by the record.

The first paragraph of the Statement of Facts, states:

> After MDOT condemned approximately fifty-one acres, **the property owner developed an office park on the remainder**, which had been rezoned. These changes to the property's zoning, in fact, occurred as the property owner had anticipated before assembling the property. (Tr, 4/2/01, Doozan, p 252; Apx 250a; Tr, 4/6/01, Fuller, p 51; Apx 200a; Tr, 4/5/01, Sosin, pp 68-70, 96; Apx 428a, 435a). [Brief, p 1, emphasis added.]

As the testimony quoted hereafter and at page 32 of this brief shows, the record does **not** describe what the jury saw. Furthermore, the string of citations to the record within that excerpt from the Owners' brief, do not support the Owners' claims.

Apx 250a does support the second sentence, but not the characterization regarding development of an office park in the first. Tr, 4/6/01, Fuller, p 51; Owners' Apx 200a, records the testimony of Mark Stuecher, not Fuller – and that testimony has nothing to do with either of the quoted sentences. Tr, 4/5/01, Sosin, pp 68-70, 96; Owners' Apx 428a, 435a, records the testimony of Fuller, not Sosin. Page 68, Owners' Apx 428a, provides no support for either sentence. Pages 69 and 70 appear at Owners' Apx 429a, and again provide no support for the claims made in the two quoted sentences. Finally, Fuller's testimony on page 96, Owners' Apx 435a, has no relevance to those claims.

At p 8 of their Brief, the Owners make another statement relevant to what the jury would have seen on its view: "By the time of trial, development of the property owner's high-tech office park was well underway. (Tr, 4/2/01, Doozan, p 230; Apx 245a)." Again, the cited page of the transcript does not support the representation:

Q What's this property on the north side of Fourteen Mile Road? What use is that?
A That is a commercial use, a shopping center.
Q And over here on the east side?
A Also.
Q And it goes up about halfway, approximately?
A No. There's a different shading pattering, [sic] indicating, I believe, residential use.
Q Oh, that's behind it. I'm sorry, right. It's commercial halfway up, and then it's residential behind it. Take a look.
A I think you were looking at Fifteen Mile there.
Q Was that Maple I'm looking at?
A Yeah, this is Fourteen Mile. This pattern is commercial.
Q I think my navigator's been off all day by one mile. It's Fifteen – it's Maple, okay.
A And this pattern is multiple family residential.
Q Okay. What is this here, the north side of Fourteen Mile?

A It's planned for office use behind the commercial.
Q Is there offices there all the way back? What is that back there?
A **It's primarily vacant currently, I believe.**
Q **That's Haggerty Development, the Haggerty Development**
[Emphasis added.]

The Owners quote the trial judge's description of the jury view. [Brief, p 13]. As that quotation reveals, the judge described the path that the bus took on the jury view; he did not describe what the jury saw. But the Owners added to that quotation the following statement, in brackets:

> [i.e. Owner's collector road from Twelve to Thirteen Mile, **the developed part of the property**, see Tr, 3/30/01, p 120] [Brief, p 13].

That statement was made by the Owners' legal counsel, Mr. Ackerman, in his opening statement to the jury. [Tr, 3/30/01, p 120; Owners' Apx 176a]. The remarks of legal counsel, whether in the brief, or at trial, are not evidence and must be disregarded. *In re Marx's Estate*, 201 Mich 504, 507; 167 NW 976 (1918). "[F]ailure of proof on a given subject may not be supplied by the unsupported statements of counsel."

The Owners also state:

> The jury's trip along the property owner's collector road from Twelve to Thirteen Mile took it right through the heart of Owner's property, **what Biehl testified was the "developed" portion** (Tr, 4/5/01, p 235; Apx 398a), **with new office buildings on both sides of the road**. Only the portion of the property north of Thirteen Mile was undeveloped at the time of the jury view. (*Id.*). [Brief, p 13, emphasis added.]

That description of what the jury saw cannot be drawn from the cited transcript page:

Q Now, talking about cures and talking about this site, the jury was at the site, most of this -- **most of the Haggerty Partners' property isn't even developed, isn't that correct?**
A **Yeah.** The south – the south end is being developed, the north end is not.
Q Okay. And you've been out to the site; correct"
A Yes, I have.
Q Fair to say the north site is probably about seventy percent of the acreage? Does that sound right?
A In – I'd have to go and review my notes just to check and see.
Q You think you have a feel for that in being able to answer the question?

A It's – in terms of acreage, it's – I'd have to look it up, I just – I don't have it offhand. [Tr, 4/5/01, Biehl, p 235; Apx 398a, emphasis added.]

That testimony indicates that most of the property "isn't even developed;" it does not describe the nature of any development on the property. It certainly does not describe the path the jury took or state, as the Owners claim, that there were "new buildings on both sides of the road."

With regard to the cost-to-cure issue, the Statement of Facts represents that the Owners' expert, Fuller, did in fact, calculate the after value of the remaining property, and that he did not arrive at that value by subtracting the costs-to-cure from the before value:

> **Fuller's "after" value, despite MDOT's assertions, was not simply his "before" value less the costs to cure.** Fuller opined that a potential buyer after the taking would have paid less than a before-minus-cures price, because of uncertainties inherent in a pre-development purchase. Accordingly, the "as is" after value of $38.7 million was some $2 1/2 million less than a simple before-minus-cures price would have been. [Tr, 4/6/01, Fuller, p 88; Owners' Apx 433a; Brief, p 11, emphasis added.]

That recitation is mere obfuscation. Before examining those quoted statements, it should be noted that Fuller answered a direct question on the point and testified that he did **not** appraise the after value of the remainder, "as is," without considering costs to cure:

Q R-A. Now, **did you calculate what the remainder of the property would be worth without the cures**, or alleged cures that the property owners claim haven't been done in this case? If I just wanted to buy the property and sell it, I don't want to do all these cures, I just want to sell this property, what's the remainder worth?
A The remainder with the additional land added in or not?
Q No, the remainder of the property that existed on the date of acquisition.
A Then **the answer to your question is, no. I didn't calculate that.**
[Tr, 4/6/01, Fuller, p 88; Owners' Apx 433a, emphasis added.]

Fuller testified that, on instructions of legal counsel, he first performed an appraisal that assumed there were no damages or costs to cure for the remaining property. Under that premise, he testified that, after the taking, the remaining property was worth $46,850,000 and, before the taking, the entire property was worth $57,300,000. The difference, or the amount of

just compensation for the 51 acres taken, assuming no damages, was $10,450,000. [Tr, 4/6/01, Fuller, pp 77-81; Owners' Apx 431a, 432a].

Fuller was then asked to supplement that original appraisal with a cost-to-cure figure of $6,870,000, provided by Biehl. On his own, Fuller then added a "contingency" to that figure, of $2,490,000. He testified that the purpose of that contingency was to account for the possible understatement by Biehl of the $6,870,000 in costs-to-cure. [Tr, 4/6/01, Fuller, pp 85-87; Owners' Apx 433a].

Fuller then testified that he calculated "an indicated value as is of forty million four-seventy" by subtracting the $6,870,000 in costs-to-cure, plus $2,490,000 contingency, from his before value of the remainder of $49,830,000[1] – to yield "an indicated value as is" of the remaining property of $40,470,000. [Tr, 4/6/01, Fuller, pp 86-88; Owners' Apx 433a] Fuller simply derived a value by subtracting the costs-to-cure and contingency; he did not determine a value, if the property were sold "as is," so that the costs-to-cure could be compared to the damages to be mitigated. [Tr, 4/6/01, Fuller, p 88; Owners' Apx 433a].

To provide context for the legal issues raised in this appeal, it is necessary to supply certain additional facts regarding the proceedings at trial.

On or about March 7, 2001, MDOT filed a Motion in Limine, with supporting brief, arguing that the opinions of the Owners' appraisers should be barred because they did not perform a before and after analysis of the Owners' property. [MDOT's Apx 1b-20b].

MDOT also filed a Motion in Limine to bar the post-taking rezoning evidence. [Owners' Apx 43a-69a]. In support of that motion, MDOT attached various exhibits, showing there was

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[1] Fuller and his legal counsel used multiple, confusing and contradictory numbers for elements of Fuller's computations. Since it is not necessary for this appeal, this brief will not attempt the impossible task of reconciling the various conflicting numbers.

no reasonable possibility the Owners' property would have been rezoned or the rezoning was caused by MDOT's highway project; see selected exhibits. [MDOT's Apx 21b-40b].

On March 15, 2001 the court heard arguments on various motions filed by the parties. Pertinent to this appeal, in an Opinion and Order dated March 29, 2001, the court granted the Owners' Motion to Exclude Reference to Project Related Benefits and denied MDOT's Motion in Limine to exclude the rezoning evidence. [Owners' Apx 142a-146a; MDOT's Apx 41b-43b].

To show that the jury faced a factual dispute regarding the possibility of rezoning, note should be taken of some of the evidence in favor of MDOT's position.

On the date of taking, December 7, 1995, the property was zoned R-A, residential acreage district. The R-A, residential acreage districts are intended to provide areas within the community characterized by large lot, low density, single family dwellings. The R-A designation was changed from Residential Agriculture District, to Residential Acreage District in August, 1995. The principal land uses permitted under this designation were unaffected by the name change. [Tr, 4/2/01, Rogers, pp 94-95; Owners' Apx 211a].

The master plan for the City of Novi, as revised in 1980, 1988, and – just two years before the taking, in 1993 – retained the residential zoning classification. The City aggressively enforced its master plan land use related to zoning. [Tr, 4/5/01, Quinn, pp 14-15; Owners' Apx 342a; Tr, 4/5/01, Kriewal, p 37; Owners Apx 349a].

The Owners never filed a petition for a zoning change. [Tr, 4/2/01, Rogers, pp 105-106; Owners' Apx 214a; Tr, 4/5/01, Sosin, pp 74, 102; Owners' Apx 359a, 365a]. Instead, the Owners claimed reliance on a city official's speculations as to anticipated political developments, to occur years into the future. A named owner, Neil Sosin, explained that he was advised in 1993 by Ed Kriewal, former City Manager of Novi, that it would be much better if the City initiated a rezoning of the property, rather than the Owners petitioning for a rezoning. Kriewal

advised the Owners that the political timing was not right. The Owners were further advised that they would have only one opportunity to have their property rezoned, and it was best to wait until the political timing and opportunity were an absolute certainty. Two and one-half years after this action was filed, the timing was right and the City initiated a rezoning of Owners' property. [MDOT's Apx 34b-40b; Tr, 4/5/01, Kriewal, p 25; Owners' Apx 346a; Tr, 4/5/01, Sosin, pp 78-79; 100-102; Owners' Apx 359a, 364a-365a]. Had the Owners filed a petition for rezoning prior to the construction of the M-5 Haggerty Connector, it would have been denied. There was no reasonable possibility that the Owners' property would have been rezoned on the date of taking, December 7, 1995. [Tr, 4/2/01, Rogers, pp 191, 193; Owners' Apx 235a; Tr, 4/2/01, Doozan, p 208; Owners' Apx 239a; Tr, 4/5/01, Capote, pp 277-279; Owners' Apx 409a].

During the period leading up to the City revisiting, and actually rezoning the property, MDOT's highway project was well underway. Prior to the date of taking, phase 1 of the project had begun to connect with the I-275 and I-96 intersection and run north to 12 Mile Road, just south of the Owners' property. That phase was completed in mid-1996. [Tr, 4/2/01, Steucher p 22; Owners' Apx 193a].

The second phase continued the Connector north from 12 Mile Road to 14 Mile Road, and included reconstruction of 13 Mile Road adjacent to the Owners' property. That occurred between August 1996 until August of 1999. [Tr, 4/2/01, Stuecher, pp 26-29; Owners' Apx 194a-195a]. It was during this second phase of the M-5 project that the City of Novi created a new zoning classification for Office, Service, and Technology (OST), and rezoned Owners' property from low density, one-acre, single family residential (R-A) to OST. [Brief, p 8].

MDOT's appraiser, Donald Wieme, appraised the property as of December 7, 1995, the date of taking. [Tr, 4/3/01, Wieme, p 190; Owners' App 302a]. A feasibility study determined it would be economically feasible to develop the property as a residential subdivision; the land was

highly desirable for residential use. Wieme concluded that, as of the date of taking, it was highly unlikely the property would have been rezoned. [Tr, 4/3/01, Wieme, p 193; Owners' Apx 303a].

Wieme determined just compensation was $1,415,000.[2] [Tr, 4/3/0101,Wieme, p 206; Owners' Apx 306a]. Since the good faith offer had been $2,758,000, MDOT allowed the jury to use that figure for the spread within which it could make an award. [Tr, 3/30/01, p 115; Owners' Apx 175a; Tr, 4/9/01, p 147; Owners' Apx 491a;] The jury returned a verdict in favor of the Owners in the amount of $14,877,000. [Tr, 4/9/01, p 155; Owners' Apx 493a].

[2] The Owners have argued that Wieme's appraisal had the same omission as Fuller's, because he failed to do an "as is" appraisal of the remainder, reflecting the impact of the modest severance damages. That is correct. But so long as MDOT was willing to pay the $64,100 to cure all damages found by Wieme, it was not required to pay for another appraisal to assure that it was not overpaying. The Owners, however, sought $9,360,000, 146 times more than $64,100 in damages, and had no right to expect MDOT to just pay that sum, without knowing whether those alleged costs-to-cure served to mitigate the damages, or exceeded them. The Owners, unlike MDOT, had no concern about incurring additional reasonable appraisal expenses, as MDOT, not the Owners, would bear them, MCL 213.66.

SUMMARY OF THE ARGUMENT

The central issue in this appeal concerns whether evidence was admitted and excluded under erroneous interpretations of the law, so as to prevent the jury from fairly determining just compensation. Two specific issues are raised. The first concerns the trial court's rulings for considering the effect of a "reasonable possibility of rezoning" on market value. The second concerns the manner of determining costs-to-cure in a partial taking case.

The Owners valued the property through a series of speculative and conjectural calculations, as if it were zoned for office use, and sought $18,586,000. Because the trial court's rulings disregarded controlling law, the jury was misled and it awarded $14,877,000.

Case law requires the jury to consider the reasonable possibility of rezoning to the extent that it would affect the price that a willing buyer would pay for the property, just prior to the taking – and not as of some future date. Additionally, if the possibility of rezoning, or actual rezoning, is caused by the acquisition of the property and the project, it may not be considered. Over objections, the trial court admitted evidence that two and one-half years after the taking, the property was actually rezoned from residential to office use. At the same time, the trial court barred MDOT from eliciting any evidence to show that the highway project changed the character of the area, and caused the rezoning. Those rulings prevented MDOT from showing that, but for the highway project, there was no reasonable possibility of rezoning. By also telling the jury that the property was later rezoned, the trial court assured that the Owners' claim – that rezoning was a virtual certainty – would be accepted by the jury. And, it was.

As part of their claim, the Owners sought $9,360,000 in "costs-to-cure." Case law provides that such costs are for the purposes of mitigating damages that the remaining property would otherwise suffer, i.e. severance damages. Severance damages are measured by

subtracting the market value of the remaining property "as is" (in its "damaged" state) after the taking, from its market value before the taking. Costs-to-cure cannot exceed the dollar amount of severance damages. Yet, the trial court allowed the Owners to seek their costs-to-cure without ever establishing the dollar amount of the damages that those hypothetical expenditures were intended to cure. It is impossible to know, therefore, the extent to which the $9,360,000 in costs-to-cure exceeded the severance damages and unjustly enriched the Owners.[3]

Ultimately, the Owners sought $18,586,000, based on the hypothetical use of the vacant land for office use, contrasted with MDOT's valuation of $1,415,000 for residential use. The jury awarded $14,877,000. While the magnitude of the windfall cannot be accurately measured, it is evident that the errors committed by the trial court allowed the Owners to obtain millions of dollars in unsupported and unjust enrichment.

As directed by this Court's July 11, 2004 Order granting leave to appeal, this brief will show that the post-taking rezoning evidence was inadmissible and that the Court of Appeals' reversal of the jury verdict was consistent with *VanElslander, infra*.

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[3] In its Brief in Response to the Application for Leave to Appeal to this Court, MDOT showed how the Owners were allowed to use a hypothetical site plan, then calculate their "costs-to-cure" based upon what it would cost to partially construct that hypothetical development – a purely speculative endeavor. Additionally, after receiving the sum of the costs-to-cure from the engineer, Biehl, the appraiser, Fuller, added a completely unsubstantiated and speculative $2,490,000 "contingency," purportedly to account for the possibility that Biehl's figure of $6,870,000 may have understated the various elements of the costs-to-cure. Yet, Fuller did not testify how Biehl made his calculations e.g. to show whether Biehl was liberal in his calculations or even whether he had, expressly or otherwise, already built contingencies into his calculation of $6,870,000. However, this court did not grant leave to appeal as to that issue.

ARGUMENT

I. A post-taking zoning decision may not be considered in determining value at the time of the taking; the jury was required to decide the extent to which a possibility of rezoning would have affected the price that a willing buyer would have offered for the property just prior to the taking.

A. Counter-Statement of the Standard of Review

Dep't of Transportation v Van Elslander, 460 Mich 127, 129; 594 NW2d 841 (1999), requires review of an evidentiary ruling for an abuse of discretion:

> We review the trial court's decision to exclude evidence for an abuse of discretion. *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995); *Detroit v Gorno Steel & Processing Co*, 157 Mich App 294, 311; 403 NW2d 538 (1987).

People v Lukity, 460 Mich 484, 488; 596 NW2d 607 (1999), provides for a *de novo* review of preliminary issues of law underlying an evidentiary ruling:

> [D]ecisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo

People v Lynn, 468 Mich 272, 278; 662 NW2d 12 (2003) followed *Lukity* holding that a trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law:

> [W]hen such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *Id.*

Relief will be granted if refusal to do so appears inconsistent with substantial justice or would affect a substantial right of a party, as stated in *Craig v Oakwood Hospital,* 471 Mich 67, 76; 684 NW2d 296 (2004):

> We review a trial court's decision to admit or exclude evidence for an abuse of discretion. A court necessarily abuses its discretion when it "admits evidence that is inadmissible as a matter of law." However, any error in the admission or exclusion of evidence will not warrant appellate relief "unless refusal to take this action appears . . . inconsistent with substantial justice," or affects "a substantial right of the [opposing] party." [Footnotes omitted.]

In *Western Michigan University Board of Trustees v Slavin,* 381 Mich 23, 26; 158 NW2d 884 (1968), this Court stated in regard to an appeal from a jury verdict in a condemnation case: "where prejudicial, inadmissible testimony was received and acted upon by the jury, . . . this Court upon appeal will reverse."

The trial court erred in admitting the rezoning evidence, based upon a misinterpretation of the law concerning materiality and the temporal element for determining just compensation; it was an abuse of discretion given that fact and the prejudicial nature of that post-taking evidence.

B. Analysis

1. The possibility of rezoning may be considered to the extent that it would have affected the price that a willing buyer would have offered for the property just prior to the taking.

The admissibility of post-taking rezoning evidence must be considered in light of the purpose and role of the possibility of rezoning in a condemnation case.

Const 1963, art 10, § 2 requires payment of "just compensation" for property taken for public use. In *Silver Creek Drain District v Extrusions Division, Inc.,* 468 Mich 367; 663 NW2d 436 (2003), this Court addressed how the phrase "just compensation" is to be interpreted:

> The rule is . . . that "if a constitutional phrase is a technical legal term or a phrase of art in the law, the phrase will be given the meaning that those sophisticated in the law understood at the time of enactment unless it is clear from the constitutional language that some other meaning was intended."
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> * * *
>
> The meaning of "just compensation" cannot be discerned merely by a careful reading of the phrase.
>
> * * *
>
> This means that, in this case, it is appropriate to review **the consensus understanding in 1963, by those skilled in this area of law, of the meaning of "just compensation."** [468 Mich at 375-376, citation omitted, emphasis added.]
>
> * * *
>
> [I]n our law, "just compensation" was a legal phrase of art in 1963 that meant, and still means, that the proper amount of compensation for property takes into account all factors relevant to market value. **It is this meaning that the constitutional drafters and ratifiers are held to have understood when they were adopting the Michigan Constitution of 1963** [468 Mich at 378-379; footnote omitted; emphasis added.]

In *State Highway Comm'r v Eilender,* 362 Mich 697, 699; 108 NW2d 755 (1961), decided just two years prior to ratification of the 1963 constitution, this Court established the legal principles for considering the possibility of rezoning to determine just compensation:

> Just compensation, we have held, must put the party injured in as good position as he would have been if the injury had not occurred. It should neither enrich the individual at the expense of the public nor the public at the expense of the individual. The determination of value in each case, we have also held, is not a matter of formula or artificial rule but of sound judgment and discretion based upon the relevant facts in the particular case. Here 1 of the relevant facts pertained to an already-pending modification of the zoning. This is not to say that speculative future uses incompatible with existing zoning are to be assigned a valuation. **We look at the value of the condemned land at the time of the taking, not as of some future date.** If the land is then zoned so as to exclude more lucrative uses, such use is ordinarily immaterial in arriving at just compensation. But, on the other hand, it has been held, **"if there is a reasonable possibility that the zoning classification will be changed, this possibility should be considered** in arriving at the proper value. This element, too, must be considered **in terms of the extent to which the 'possibility' would have affected the price which a willing buyer would have offered for the property just prior to the taking."** [Emphasis added; footnotes omitted.]

That entire paragraph sets forth well accepted principles of eminent domain law.[4] Importantly, that 1961 *Eilender* decision certainly was in the minds and understanding of the constitutional drafters in 1962 and the ratifiers in 1963. The foregoing ruling of *Eilender* necessarily reflects the "consensus understanding in 1963, by those skilled in this area of law, of the meaning of 'just compensation.'" Effectively confirming that view, this Court followed *Eilender* in *Van Elslander* [460 Mich at 130] and cited it in *Silver Creek* [468 Mich at 378].

Relevant to the *Eilender* principles, a case relied upon by the Owners, *State of New Jersey v Gorga,* 26 NJ 113; 138 A2d 833, 835 (1958), explained the limited role of the possibility of rezoning on valuation:

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[4] Except for its position on post-taking rezoning, the Owners' brief generally accepts the principles set out in that quotation, e.g. "fair market value of the property at the time of taking" governs, and "evidence that tends to affect market value of the property as of the date of the condemnation is relevant." [Brief, p 21]

> **The important *caveat* is that the true issue is not the value of the property for the use which would be permitted if the amendment were adopted.** Zoning amendments are not routinely made or granted. A purchaser in a voluntary transaction would rarely pay the price the property would be worth if the amendment were an accomplished fact. **No matter how probable an amendment may seem, an element of uncertainty remains and has its impact upon the selling price. At most a buyer would pay a premium for that probability in addition to what the property is worth under the restrictions of the existing ordinance.** [Emphasis added.]

In summary, the reasonable possibility of rezoning "must be considered in terms of the extent to which the 'possibility' would have affected the price which a willing buyer would have offered for the property **just prior to the taking**." *Eilender,* 362 Mich at 699.

That general rule, that value is to be ascertained as of the date of taking, is well settled. *United States v Miller*, 317 US 369, 374; 63 SCt 276; 87 LEd 336 (1943) held: "[V]alue is to be ascertained as of the date of taking." Consistent with *Eilender*, *In re Urban Renewal, Elmwood Park Project*, 376 Mich 311, 318; 136 NW2d 896 (1965) held: "First, the date of taking should be determined. Next, the value of the property as of that date is to be ascertained."

Section 20 of the Uniform Condemnation Procedures Act, 1980 PA 87, (UCPA)[5] MCL 213.70 reiterates that principle:

> **The value** of each parcel, and of a part of a parcel remaining after the acquisition of a part of the parcel, **shall be determined with respect to the condition of the property and the state of the market on the date of valuation.**[6] [Emphasis added.]

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[5] The UCPA was amended effective December 26, 1996, but the amendments only apply to cases in which the good faith offer was made after that date. The instant case is governed by the prior version of the UCPA. References and quotations in this brief will be based on that earlier version of the UCPA.

[6] Section 20 of the UCPA, MCL 213.70 makes the date of taking, here December 7, 1995, the valuation date, with certain inapplicable exceptions: "The date of acquiring and of valuation in a proceeding pursuant to this act, shall be the date of filing unless the parties agree to a different date, or unless a different date is determined by a counterclaim filed pursuant to section 21."

2. Evidence of the post-taking rezoning was not relevant.

The Owners do not even attempt to contest that principle in their appeal. Instead of showing how post-taking zoning is material to valuation, the theme throughout the Owners' brief is the persuasiveness of their evidence and how rezoning was a virtual certainty – as if that made the rezoning evidence harmless error. The Counter-Statement of Facts highlights some of the opposing evidence, showing why MDOT argued there was not a sufficient possibility of rezoning to affect market value. It is not possible, however, to directly compare the Owners' evidence on the possibility of rezoning with MDOT's, because MDOT's evidence disregarded any influence of the highway project, while the Owners' evidence did not. In any event, this appeal is not about which party presented the most persuasive evidence.[7] It is sufficient to recognize that the jury was required to reconcile conflicting evidence and draw factual conclusions having great financial consequences. At issue is the relevance of the rezoning evidence.

VanElslander, supra addressed a trial court's exclusion of evidence on the possibility that damages in a partial taking case could be mitigated by obtaining a zoning variance, citing "relevance" as the threshold of admissibility. [460 Mich at 129].

Relevance has two components, materiality and probative value. Materiality concerns the fit between the propositions the evidence is offered to prove and the issues in the case. If evidence seeks to prove a proposition that is not a matter in issue, it is immaterial. What is at issue is determined by the pleadings, and controlled by substantive law. Probative value has to do with the tendency of evidence to establish the proposition it is offered to prove. A fact that is

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[7] The Owners inconsistently claim that post-taking zoning evidence was necessary to refute MDOT's claim that there was no possibility of rezoning, while the main thrust of their brief on appeal is to argue that their evidence showed the possibility to be a virtual certainty.

"of consequence" is material, and evidence that affects its probability has probative force. [MRE 401, 1 McCormick on Evidence, 5th Ed, Ch 16, pp 637-638, *People v Crawford,* 458 Mich 376, 388-389, 389-390; 582 NW2d 785 (1998)]. Evidence of post-taking zoning is not material. That fact is best shown by an illustration.

Suppose that upon consideration of all the evidence that could have been discovered and known on the date of taking, the jury were to determine that the property would have sold for $85,000 per acre, reflecting a 70% premium over a $50,000 value for residential use. Suppose that, if the property had already been rezoned on the date of taking, it would have sold for $180,000 per acre. Finally, suppose that a decision on rezoning was made two and one-half years after the date of taking. If trial were held one year after the date of taking, just compensation would be based on $85,000 per acre. That is the price that the property would have sold for on the date of taking – the "highest price" that it would have brought in the market on that date. But, if trial were delayed until three years after the taking, and the zoning decision had been made, could that decision – whether to grant or deny rezoning – possibly affect "the price which a willing buyer would have offered for the property **just prior to the taking**"? The question provides the answer; of course not. If rezoning were to be **denied**, that future development could not alter the fact that, on the date of taking, the property had a value of $85,000 per acre. To use a future factual development to diminish just compensation would violate the principles embodied in our constitution: "We look at the value of the condemned land at the time of the taking, not as of some future date." *Eilender,* [362 Mich at 699]. The same is true, if the rezoning were **granted** two and one-half years after the date of taking. To pay the property owner more than $85,000 per acre would violate the foregoing principle, and an additional one reiterated in *Eilender*: "Just compensation . . . should neither enrich the individual at the expense of the public nor the public at the expense of the individual." [362 Mich at 699].

Just compensation must be based on the state of the market on the date of taking. The sole purpose of considering the possibility that the property might be rezoned for a higher use, is to assign a value to that inherently uncertain possibility. *Eilender, supra.* As the Owners state: "Value was based on the **prophecy** of a zoning change to permit high-tech office development on the property." [Brief, p 31] Since it would have been both contradictory to the notion of prediction, and literally impossible for the market to factor into the valuation a decision made years later, evidence of that decision is not probative of a fact of consequence. To consider that future factual development would necessarily be to value the property at a "future date." Post-taking zoning evidence is not material; it is not relevant; and, it is not admissible.

3. Evidence of post-taking rezoning was not admissible to confirm the accuracy of the jury's prediction of the possibility of rezoning on the date of taking.

If the question of the possibility of rezoning were extracted from its context and assessed as an abstract question, it might be concluded that the fact of rezoning would be probative as to whether, in the recent past, there had been a "reasonable possibility" of rezoning. That appears to be the approach taken in certain foreign jurisdictions where post-taking zoning evidence has been said to be admissible, with no analysis of materiality or prejudicial effect.

That is also the Owners' claim:

> The jury may test the reasonableness of any expectation of a change in zoning by looking at events which occurred after the valuation. [Brief, p 22].

> How better to test the strength of a prediction than to ask whether it came true? [Brief, p 24].

But the premise is flawed. The accuracy of the prediction is not a "fact of consequence;" it is not material to determining just compensation.

Of course the accuracy of any prediction would be enhanced by telling the predictors the actual outcome. But then it ceases to be a prediction. In condemnation cases, it ceases to

represent a valuation as of the date of taking – and becomes a valuation based on the state of the market at a future date – here two and one-half years later.

If post-taking zoning evidence is to be considered, but solely to confirm the accuracy of what the prediction would otherwise be, how is the evidence to be used? Is the jury to factor in the then known certainty of rezoning in arriving at market value? If yes, should that market value be the price as rezoned, discounted solely for the time and expense to get the rezoning?[8] If the jury is not to allow the actual rezoning to influence its decision on what a buyer would have paid on the date of taking, how is the post-taking rezoning evidence relevant?

It is the possibility and its effect on value **on the date of taking** that must be determined in a condemnation case. It is sophistry to parse out the "possibility of rezoning" as if it were an abstraction, independent of valuation. As *Eilender* makes clear, the relevance of the possibility of rezoning is tied to its effect on market value on the date of taking, "not as of some future date." That temporal element cannot be ignored. The market could not factor the accuracy of its prediction into value and it should not be factored into the jury verdict.

Evidence of post-taking rezoning may be "probative" of whether, in hindsight, the possibility of rezoning on an earlier date was, or was not, at a particular level, but that point is not "material" to a matter at issue in the case. As the Court of Appeals majority correctly held: "evidence of the actual zoning change was irrelevant to the value of the property on the date of taking and should not have been disclosed to the jury." [Op, p 3; Owners' Apx 546a].

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[8] In the instant case, the Owners took far less of a discount that even that extreme view would support. They applied a 6 ½ % discount to the top-of-the-range price that property zoned for office use would sell for. [Brief, p 18]. That is plainly a gross understatement of the discount contemplated in *Eilender*, given the inherent risk and uncertainty of future political decisions, and the delay and its associated expense until rezoning might be achieved.

4. Even if evidence of post-taking rezoning were found to be relevant, it was inadmissible to the extent that rezoning was attributable to MDOT's highway project.

The Owners argue that the reasonable adaptability of property to more valuable uses, including the possibility of rezoning, must be considered in determining just compensation. [Brief, p 23]. MDOT agrees. There is no need to address supporting case law. *Eilender* settles the matter. But the Owners were not entitled to be paid for that part of any increased value that was caused by MDOT's project. The trial court clearly erred in allowing them to do so.

The Owners quoted 4 Nichols, Eminent Domain (3d ed), § 12C.03[3] to the effect that post-taking rezoning evidence "has been held to be weighty evidence of the existence (at the time of the taking) of the fact that there was a reasonable probability of an imminent change." [Brief, pp 24, 34]. But, Nichols qualified that statement. In a case cited by the Owners to support admission of the evidence, *Roach v Newton Redevelopment Authority,* 381 Mass 135; 407 NE2d 1251, 1253 (1980), Nichols was quoted for the qualification that that "weighty evidence" of post-taking rezoning may **not** be considered if the rezoning is attributable to the project:

> It is common ground that the fact that a potential use is prohibited by the zoning law at the time of the taking does not prevent its consideration as an element of value "if there was then a reasonable prospect that the bar would soon be lifted." . . . See 4 Nichols, Eminent Domain § 12.322[1] (rev. 3d ed. 1979). **Actual amendment** of the zoning law, subsequent to the taking, **may be "weighty evidence"** of such a prospect. *Id.* at § 12.322[2] at n.11. **On the other hand, it is settled that "a person whose land is taken for public use cannot recover the enhancement in value due to the improvement for which the land is taken."** . . . Hence **a probability of rezoning or an actual change in zoning cannot be taken into account if it "results from the fact that the project which is the basis for the taking was impending."** 4 Nichols, *supra*, § 12.322(1) at n.7.1. [Emphasis added.]

The current update of the Nichols treatise, 4 Nichols, Eminent Domain (3d ed), § 12C.03[2] confirms that limitation on the admissibility of post-taking rezoning evidence:

> An additional caveat to consider is that if the reasonable possibility of a rezoning exists or if, in fact, an actual rezoning takes place, as a result of the project for which the

property is taken, neither the probability of rezoning nor the actual rezoning may be considered. [Footnote omitted.]

In another case relied on by the Owners, *Gorga, supra,* the court recognized that a rezoning could have been "deprive[d] . . . of all probative value as a matter of law" by proof that "the amendment would not have been adopted if the condemnation program had not been put in motion." [138 A2d at 835]. Several of the Owners' other foreign cases adopt that same principle.[9]

That prohibition against increasing compensation based on changes caused by the project, including rezoning, is firmly established in eminent domain jurisprudence. In *United States v Reynolds,* 397 US 14, 16, 17-18; 90 S Ct 803; 25 L Ed 2d 12 (1970) the Court stated:

> The Court early recognized that the "market value" of property condemned can be affected, adversely or favorably, by the imminence of the very public project that makes the condemnation necessary. And it was perceived that **to permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to the "just compensation"** that the Constitution requires.
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> * * *
>
> **"[T]he Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities."** [quoting *United States v Miller,* 317 US 369, 376-377; 63 S Ct 276; 87 L Ed 336 (1943); emphasis added; footnotes omitted.]

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[9] Several of the cases cited by the Owners restated that principle, in reference to considering post-taking comparable sales: *Hance v State Roads Comm of Maryland,* 221 Md 164, 175-176; 156 A2d 644 (1959) ("[T]he price sought to be offered must not have been materially enhanced or decreased by the project or improvement occasioning the taking.") *State of Hawaii v Heirs of Halemano Kapahi,* 48 Haw 101, 113; 395 P2d 932 (1964) ("We are in complete agreement with plaintiff's contention that an owner of land should not be allowed an increased value for his land due to enhancement resulting from the improvement project.") *City of Tucson v Ruelas,* 19 Ariz App 530; 508 P2d 1174, 1176 (1973) ("[C]omparable sales which reflect an enhanced value brought about by the making of the improvement are not admissible." *Virgin Islands Housing Authority v 15.5521 U. S. Acres of Land in St. Croix*, 230 F Supp 845, 847 (1964) ("[A] condemnation itself may increase prices and the government should not have to pay for such artificially inflated values.") The Owners admit as much. [Brief, p 27, fn 15].

This Court has also ruled that: "Where condemnation proceedings tend to increase the value of property, the property owner is not entitled to the increased value." *In re Urban Renewal, Elmwood Park Project,* 376 Mich 311, 318; 136 NW2d 896 (1965).

a. Evidence that the highway project caused the rezoning.

MDOT's construction of a major highway through vacant land that was zoned for residential use, changed the character of the area and opened up commercial opportunities. While MDOT was not allowed to adduce evidence on the point, common sense shows that the area must have become more suitable for office use because of the highway project. Thus, the rezoning to office use was probably caused by construction of this multi-lane, limited access highway through what would otherwise have been a residential area.

In its response to the Owners' motion to bar evidence of benefits, MDOT cited the Owners' January 7, 1992 letter to MDOT, complaining about MDOT's appraisal and acknowledging that the project would cause rezoning of the property. MDOT's response stated:

> Moreover, it is arguable, if not probable, that witnesses are expected to testify that the proposed zoning change from RA to OST (office, service, and technology) could not have been accomplished without the construction and development of the Haggerty Road Connector (M-5).
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> * * *
>
> It is interesting to note that even the Defendants' President, **Neil Sosin, has admitted that the Michigan development was a major reason, if not the major reason, for the 1998 zoning change** to OST (office, service, technology). (EX A – Letter from Neil Sosin to Thomas Jay, MDOT, articulating his belief that the exposure to highways would profer a zoning change.)
> [Plaintiff's Brief in Response to Defendants' Motion in Limine to Exclude Reference to Project Related Benefits; MDOT's Apx 47b; emphasis added.]

That letter from Sosin to MDOT states:

> 2. The appraiser has stated that the highest and best use of the property is residential. The corner of a major cloverleaf expressway exit servicing I-696, I-96 and I-275 will not be developed as residential property.
>
> * * *

> **While the property is currently master planned for large lot residential, the Master Plan predates the Haggerty Connector project and is in the process of being reviewed, specifically as to these parcels, by the Novi Planning Commission.** [Attachment to Plaintiff's Answer to Defendants' Motion in Limine to Exclude Reference to Project Related Benefits; MDOT's Apx 48b, emphasis added.]

Because of the trial court's ruling, MDOT was not permitted to question Mr. Sosin on that letter. MDOT was similarly prevented from eliciting evidence about then Novi Mayor McLallen's November 20, 1997 memorandum to the Novi City Council requesting a rezoning of the Owners' property and citing the effect of MDOT's project as a reason for the change:

> When the Master Plan was originated, M-5 was not in existence. **M-5 now creates a true physical barrier on the east side of the City and creates an island at our eastern border.** [Exhibit 9 to MDOT's Motion in Limine to Strike Haggerty Corridor Partners, LLC's Appraiser's Testimony and Evidence with Regard to Highest and Best Use and to Bar Testimony of a May, 1998 Zoning Change; MDOT's Apx 33b].

The Owners may dispute whether the evidence would have led the jury to conclude that the project caused the rezoning – but they had no right to deny MDOT the opportunity to make its case. The Owners' argue to this Court: "Here the rezoning was neither sought nor produced by MDOT." [Brief, p 44]. MDOT begs to differ, and seeks merely the opportunity for a fair trial at which **both** parties can present their relevant evidence.

b. An erroneous interpretation of MCL 213.73 regarding "benefits"

The trial court granted the Owners' motion to bar any evidence that the project may have been beneficial to the property, citing a standard jury instruction:

> Benefits which accrue to the land, remaining after a partial taking, cannot be considered so as to reduce the amount of damages unless expressly authorized by statute. *State Highway Commissioner v Sabo*, 4 Mich App 291, 294 (1966). Enhancement in the value of the property has not been pled in the instant case as required by MCL 213.73(2). This Court further relies on SJI2d 90.19 to support its ruling that any evidence regarding benefits must be excluded. [MDOT's Apx 43b].

Quoting that SJI2d 90.19 (now cited as M Ci JI 90.19), the Owners first noted that section 20 of the UCPA, MCL 213.70, requires that: "The property shall be valued in all cases as though the acquisition had not been contemplated," then argued:

> MDOT, however, is trying to stand MCL 213.70 on its head and use it to do precisely what MCL 213.73 ***only*** permits to be done when the pleading supports it. MDOT wants to argue that the property was rezoned only because of its project, and therefore that the property's value as an office park depended entirely on MDOT's actions, requiring the jury to value the property as a single-family, acre lot subdivision that wasn't economically feasible to build. This is a nonsensical argument, but if MDOT wanted to make it, it should have pleaded the benefit.
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> * * *
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> When benefits are not properly pleaded, they cannot be introduced to a jury in an indirect manner. **SJI 2d 90.19 requires juries to disregard any evidence that even implies the project benefited the remainder:**
>
> > You must disregard any testimony which indicates or implies that because of this taking the remainder property has in any way benefited. You may only consider testimony that bears on damages to the subject property.
>
> In determining the value of the remainder after the taking, the jury was properly shielded from consideration of any potential project-related benefits. **The trial court did not abuse its discretion in barring MDOT from introducing evidence that the condemnation benefited the remainder by contributing to or causing its rezoning.** [Owners' Court of Appeals Brief, pp 48-50, emphasis added.]

The dissenting opinion in the Court of Appeals agreed with the Owners:

> **Plaintiff admits that it did not plead in its complaint any benefit to defendants' remaining property as a result of its construction project. Therefore, the trial court could not be said to have abused its discretion when it prevented plaintiff from presenting evidence that the rezoning occurred as a result of its construction project** because plaintiff did not follow the statute, which required plaintiff to plead such in its complaint if it was to be litigated at trial. [Op, p 21, emphasis added.]

There are a number of flaws in that analysis. The statute on which the trial court and Owners relied, MCL 213.73, has no application to the **disallowance** of increased compensation that is based on the project itself. MCL 213.73 sets forth a procedure that must be followed if the condemning agency seeks to pay less for property taken because the project will cause an

increase ("enhancement")[10] in the value of the remaining property – MCL 213.73 applies to **reduce** just compensation by increasing the value of the remaining property that is not taken:

> (1) **Enhancement in value of the remainder of a parcel, by laying out**, altering, widening, or other **types of improvement**; by changing the scope or location of the improvement; or by either action in combination with discontinuing an improvement, **shall be considered in determining compensation for the taking**.
>
> (2) **When enhancement in value is to be considered in determining compensation, the agency shall set forth in the complaint the fact that enhancement benefits are claimed** and describe the construction proposed to be made which will create the enhancement. [Emphasis added.]

An example of such a claim is explained in *In re Petition of State Highway Comm,* 383 Mich 709; 178 NW2d 923 (1970). In that case the State Highway Commission pleaded a claim of enhanced remainder value, as required by the similar predecessor to MCL 213.73, and sought to pay less for the property taken than it would otherwise pay. The State Highway Commission was constructing I-275, and was going to construct an interchange at the owner's location. It was claimed that the new freeway interchange would enhance the value of the owner's remaining property, justifying a reduction in compensation. The owner did not dispute the right of the State Highway Commission to claim such a reduction in just compensation because of the beneficial effects of the project; the owner claimed that, by quirk of statutory language, the good faith offer had to disregard the enhanced value. This Court rejected that argument.

But MDOT is not claiming that it should pay less for the 51 acres taken because the remaining 284 acres will be worth more than before the taking. MDOT is not claiming that: "enhancement in value is to be considered in determining compensation."[11] MDOT is making

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[10] "Enhance" means, "to increase or improve in value, quality, desirability, or attractiveness." *Merriam-Webster's Collegiate Dictionary*, 10th Ed, p 384.

[11] To the extent that the rezoning was caused by the project and increased the value of the remaining property, MDOT does not ask that just compensation be reduced to account for that enrichment, even though the Owners will receive it. Under the current language of the UCPA –

precisely the opposite claim. MDOT is claiming that enhancement in value of the property is **not** to be considered – **to increase** just compensation, insofar as that increase is attributable to the project. As previously noted, MDOT merely sought enforcement of the principle set forth in *Nichols, supra, Miller, supra, In re Urban Renewal, supra,* and section 20 of the UCPA: "The property shall be valued in all cases as though the acquisition had not been contemplated." [MCL 213.70]. The plain language of the two provisions will not support the Owners' construction. Moreover, sections 20 and 23 must be read in harmony[12] – each has a different purpose.

Since MDOT was barred from showing that the project caused the rezoning, the post-taking rezoning evidence could not be considered; it was irrelevant and inadmissible.

5. Any probative value of the post-taking rezoning was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury.

It is difficult to conceive how the jury could fail to have been influenced by knowledge of the actual rezoning when it was faced with assessing the credibility and persuasiveness of the dramatically opposing evidence offered by MDOT and the Owners on the possibility of rezoning, as it existed on the date of taking. How could the jury place a value on an uncertain prediction, knowing the outcome? The jury was effectively told: MDOT's position is completely unreasonable, how could it be otherwise when the property was actually rezoned? As the huge verdict reflects, $14,877,000 - where the spread was between $2,758,000 and $18,586,000 – the jury completely rejected MDOT's evidence and arguments. The jury had to

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and thus for future cases – MDOT would be able to use such an increased value solely to offset alleged detrimental effects of the project, without pleading benefits under MCL 213.73: "To the extent that the detrimental effects of a project are considered to determine just compensation, they may be offset by consideration of the beneficial effects of the project." [MCL 213.70(2)].

[12] *Macomb County Prosecuting Attorney v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001): "We construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature."

have accepted the Owners' claim that rezoning was a virtual certainty to award that sum. The post-taking rezoning evidence usurped the jury's responsibility to weigh the conflicting evidence as it actually existed in an uncertain market on the date of taking. The Court of Appeals correctly ruled: "At the very least, the improperly admitted evidence tainted the jury's resolution of the 'reasonable possibility' question of fact." [Op, pp 6-7; Owners' Apx 546a].

As explained above, the prejudicial nature of the evidence was greatly exacerbated because MDOT was barred from: (1) showing that the project caused the rezoning, and (2) having the jury instructed that it must disregard the rezoning – or the possibility of rezoning – to the extent that it was caused by MDOT's acquisition and highway project. Any relevancy of the rezoning evidence was substantially outweighed by the danger of unfair prejudice. MRE 403

One final point should be noted. The Owners argued there could have been no abuse of discretion because the jury was instructed to determine if there was a reasonable possibility of rezoning, "absent the threat of this condemnation case." [Brief, p 45]. The argument is disingenuous. First, the jury was denied the evidence that would have allowed it to determine whether the property would have been rezoned, "absent the threat of this condemnation." Second, it is nonsensical to ask the jury to apply prediction to arrive at the effect of an uncertain possibility of rezoning on market value, while specifically telling it the outcome of the matter to be predicted.

6. The comparable sales cases, foreign cases, treatises, delay cases, USPAP standards, tax cases, and contract cases cited by the Owners, are distinguishable and unpersuasive.

The following will address arguments, cases and secondary authorities cited by the Owners to support their claim that post-taking rezoning evidence is admissible.

First, a misstatement must be corrected. In reference to their foreign case authorities, the Owners stated: "Other courts have agreed with prior Michigan decisions that evidence of

subsequent rezoning is relevant and admissible, so long as it is used properly." [Brief, p 33]. In fact that are no such prior Michigan decisions, and no such decisions were cited by the Owners.

a. Post-taking comparable sales are not analogous.

The Owners cite case law pertaining to comparable sales as justification for considering evidence of post-taking rezoning. [Brief, p 27]. Comparable sales are sales of similar properties, the sale price of which may be used to estimate the price at which the condemned property could be sold. Those comparable sales prices are adjusted to account for the differences between them and a hypothetical sale of the condemned property. An adjustment for the passage of time between the comparable sale and the date of taking is common. Whether a sale occurs before a taking or after a taking, appropriate adjustments may be made. There is no predictive element and no similarity between considering a post-taking comparable sale and a post-taking rezoning. Additionally, as highlighted at p 20, fn 9 of this brief, if the price of a post-taking comparable sale reflects an enhancement in price caused by the project, that sale may not be considered.

b. The foreign case law supports reversal of the jury verdict.

Foreign cases are only as useful as they are persuasive; the doctrine of *stare decisis* has no application to them. *Sharp v City of Lansing,* 464 Mich 792, 802-803; 629 NW2d 873 (2001), *People v Jamieson,* 436 Mich 61, 86-87; 461 NW2d 884 (1990). Not one of the foreign case authorities cited by the Owners offers any analysis of the arguments raised by MDOT regarding relevancy. Mere conclusions and dicta in foreign decisions are of no value whatsoever in shaping Michigan's jurisprudence. Additionally, where a constitutional provision, here Const 1963, art 10, § 2, is at issue, this Court has stated that: "[T]he manner in which other states have construed their respective constitutions and statutes is entirely irrelevant to our constitutional analysis." *People v Goldston*, 470 Mich 523, 541; 682 NW2d 479 (2004).

The Owners cited *Gorga, supra,* for the proposition that post-taking rezoning evidence may be considered to support the reasonableness of considering the probability of rezoning in fixing the selling price on the date of taking. [Brief, p 34]. But *Gorga, supra* actually addressed a totally different argument:

> The State urges that the amendment should be excluded because it does not embrace the property in question, ... The State further urges the amendment would not have been adopted if the condemnation program had not been put in motion. [138 A2d at 835].

To the extent that the *Gorga* court's broad statement supports the Owners' position, *Gorga* is unpersuasive; it failed to assess the relevancy issue and the prejudicial effect of such evidence.

The Owners cited *Roach, supra* as having followed *Gorga* on admitting post-taking zoning evidence. *Roach* concerned a claim that, while the condemning agency was able to get a rezoning, a private individual could not have done so. The court assumed that the subsequent zoning would otherwise be admissible; it offered no analysis to support its assumption.

Bembinster v State of Wisconsin, 57 Wis 2d 277; 203 NW2d 897, 900 (1973), was also cited; but the issue in that case was whether the probability of rezoning could be proven by:

> opinion testimony of the chairman of the town zoning board and of a member of the town board to the effect that had an application for zoning change been made, it probably would have been granted.

The court ruled that the probability of rezoning: "cannot be proved by an opinion based upon a possibility or an assumption." 203 NW2d at 901. The court quoted the Nichols treatise for what **is** admissible; however, it offered no analysis of the subject.

Finally, the Owners cited *United States v 765.56 Acres of Land,* 164 F Supp 942 (ED NY, 1958), and *Reindollar v Kaiser,* 195 Md 314; 73 A2d 493 (1950), as supposed uses of subsequent rezoning "to show depreciation in value." [Brief p 34]. The first case simply noted, as to unzoned property: "at the time of trial such zoning had become a fact." 164 F Supp at 947. There was no discussion of the admissibility of the evidence. That case supports MDOT: "The

burden of proof rested upon the owners and not upon the Government to establish the damage sustained as a result of the easements taken, by a fair preponderance of the evidence, and upon opinions having a rational foundation." 164 F Supp at 949. As shown in Argument II, the Owners failed to "establish the damage sustained as a result of the taking." In *Reindollar*, the land in question was unzoned at the time of taking but, for an unexplained reason, testimony was given that it was zoned after the taking. Noting that unzoned land was more valuable, the court stated it was "certainly proper for the [trial] judge to call to the attention of the jury that the zoning laws were not in effect at the time of the taking and that it could have been utilized and used for any purpose." 73 A2d at 496. The admissibility of subsequent rezoning evidence was not discussed.

c. The Nichols treatise supports reversal of the jury verdict.

Referring to the Nichols treatise, the Owners state that "the most widely-read and well-respected treatise on eminent domain law" supports admitting post-taking zoning evidence. [Brief, p 34]. That treatise offers no analysis of the relevancy issues explained in this brief. And, as noted above, Nichols pointed out that the post-taking zoning evidence is not admissible if the zoning decision was attributable to the project. 4 Nichols, Eminent Domain (3d ed), § 12C.03[2].

d. Delay until the rezoning is not an issue in this case.

For reasons that are unclear, the Owners next assert that post-taking evidence is typically attacked "because the post-taking zoning decision occurred so long after the taking that it lends no support to the possibility of rezoning at the time." [Brief, p 33]. But MDOT made no such attack. The two foreign cases cited by the Owners are irrelevant.

e. The Uniform Standards of Professional Appraisal Practice

For the first time in its brief in this Court, the Owners cite the Uniform Standards of Professional Appraisal Practice (USPAP) as stating principles that would support consideration of post-taking zoning evidence [Brief p 24]. But those national standards expressly recognize that they are subservient to state law. The USPAP Jurisdictional Exception Rule provides: "If any part of these Standards is contrary to the law or public policy of any jurisdiction, only that part shall be void and of no force or effect in that jurisdiction." [MDOT's Apx 50b]. This Court, not USPAP, controls what constitutes admissible evidence to determine just compensation.

f. Tax cases do not support the Owners' position.

Again, for the first time, the Owners cite a series of tax court cases that have allowed the consideration of post-valuation date events in determining the value of taxable property. In addition to having the limited value of foreign case law, those cases are not analogous to a jury trial in a condemnation case – as shown by the very cases cited by the Owners.

In tax cases, courts and other highly trained tax specialists – not lay juries – determine valuation. See *Estate of Jepson v Comm'r of Internal Revenue,* 81 TC 999, 1003 (1983), *Estate of Bailey v Comm'r of Internal Revenue,* TC Memo 2002-152, 14 (2002), and *Portage Silica Co v Comm'r of Internal Revenue,* 49 F2d 985, 987 (CA 6, 1931).

The rules governing valuation in tax cases are determined by Congress, legislatures, and agencies such as the Internal Revenue Service that are responsible for administering tax laws. *Estate of Gilford v Comm'r of Internal Revenue,* 88 TC 38, 48 (1987). In contrast, just compensation in condemnation cases is governed by this Court and the United States Supreme Court. The purposes and historical antecedents are entirely different for the two areas of the law. "[W]e have held that the whole of art 10, § 2 has a technical meaning that must be discerned by

examining the "purpose and history" of the power of eminent domain." [Footnote omitted.] *County of Wayne v Hathcock,* 471 Mich 445, 471; 684 NW2d 765 (2004).

Valuations determined by tax assessing authorities are deemed to be prima facie correct. "The assessment was prima facie right and the burden was upon petitioner to show before the board that it was wrong." *Portage Silica Co.,* 49 F2d at 986. No such presumption attaches to valuation by a condemning agency.

Given all those differences, tax cases are not useful or persuasive for measuring just compensation in a condemnation case.

g. Liquidated damages case law is not useful.

Finally, as their last new argument, the Owners cite a treatise and a foreign case for the proposition that "retrospective analysis has been allowed to evaluate whether a liquidated damages clause amounts to an impermissible penalty clause." [Brief, p 27]. That contract law is not analogous. In contract law, the court is free to craft rules to implement the judicially created policy against enforcing penalty clauses in contracts. *Jaquith v Hudson,* 5 Mich 123, 133-137 (1858). Unlike the determination of just compensation, those rules are unrestrained by a constitutional provision. Additionally, that retrospective approach to liquidated damages was rejected in *Wilkinson v Lanterman,* 314 Mich 568, 575-576; 22 NW2d 827 (1946).

7. The "jury view" did not inform the jury that the property had been rezoned, so as to render the evidence of subsequent rezoning harmless.

The Owners argue that: "The jury learned of the rezoning from the jury view alone, rendering any error harmless." [Brief, p 42]. That simply is not true.

For there to be any merit in their argument, the Owners would have to cite record evidence revealing what the jury saw during its view, and showing how the seeing of that was equivalent to being told that the entire 284 remaining acres had been rezoned two and one-half

years after the taking. As reflected in the Counter-Statement of Facts, and hereafter, the Owners' descriptions of what the jury saw during the view are not supported by the record.

The Owners stated: "The jury viewed the property, including some 300,000 square feet of new office buildings." [Brief, p 42]. As was the case when they made that same assertion in their Court of Appeals' brief, they gave no citation to the record to support it, contrary to the requirements of MCR 7.306(A). MDOT's own review of the record could find no testimony or documentary evidence to support the claim.

Since the Owners' claims of what the jury saw during the view are completely unsupported by the record, their legal arguments should be disregarded.

The Owners argue that MDOT "is in no position to argue that a jury view was inappropriate in this case." [Brief, p 43]. But MDOT makes no such argument.

The Owners resume their argument that their evidence on the possibility of rezoning was so compelling that admission of the post-taking rezoning evidence was harmless. [Brief, p 44]. MDOT has shown why there is no merit to that argument.

II. The decision by the Court of Appeals is consistent with *VanElslander,* both with regard to the inadmissibility of post-taking zoning evidence and the failure to prove the amount of the severance damages as a prerequisite for seeking cost-to-cure damages.

In granting leave to appeal, this Court stated as the second issue to be considered: "[W]hether the Court of Appeals decision in this case is consistent with *DOT v Van Elslander*, 460 Mich 127; 594 NW2d 841 (1999)." [Owners' Apx p 554a]. The Court did not identify any particular element of the *VanElslander* decision that the parties were expected to address.

The Court of Appeals addressed two issues to which *VanElslander* is relevant. The first issue was addressed in Argument I. The Court ruled that the post-taking rezoning evidence was irrelevant to the value "on the date of taking." [Op, p 6; Owners' Apx 545a]. That decision

conformed to this Court's decision in *VanElslander*, which followed the principles set forth in *Eilender*:

> Thus, any evidence that would tend to affect the market value of the property as of the date of condemnation is relevant.[13] This includes evidence of the possibility of rezoning to the extent that "the 'possibility' would have affected the price which a willing buyer would have offered for the property just prior to the taking." *State Hwy Comm'r v Eilender,* 362 Mich 697, 699; 108 NW2d 755 (1961). [460 Mich at 130].

The second issue for which *VanElslander* is relevant concerns the purpose and application of cost-to-cure damages in a partial taking condemnation case. The balance of this brief will show that the decision of the Court of Appeals was consistent with *VanElslander* in regard to that issue. The Owners elected not to address that issue.

A. Standard of Review

The jury was allowed to award cost-to-cure damages with no evidence to show the dollar amount of the damages to be "cured," and thus no means to assure that the cost of the cure did not exceed the dollar amount of the damages purportedly remedied by the cure.

Whether the trial court tried the case on an erroneous legal theory presents a question of law that is reviewed *de novo, In re MCI*, 460 Mich 396, 413; 596 NW2d 164 (1999).

This issue could also be viewed as challenging an evidentiary ruling, invoking the abuse of discretion standard of review. As recognized in *Lukity, supra* and *Lynn, supra,* a preliminary question of law is to be reviewed *de novo,* and admitting legally inadmissible evidence

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[13] Neither *Eilender* nor *VanElslander* considered categories of evidence that may tend to affect the market value of the property, but are inadmissible because they concern noncompensable damages or *damnum absque injuria*. There is no indication that that broad statement was intended to overrule longstanding principles of eminent domain law excluding the consideration of certain factors, such as "circuity of travel," *Biff's Grills, Inc v State Highway Comm*, 75 Mich App 154; 254 NW2d 824 (1977) or "diversion of traffic," *State Highway Comm'r v Gulf Oil Corp*, 377 Mich 309; 149 NW2d 500 (1966) and *State Highway Comm'r v Watt*, 374 Mich 300; 132 NW2d 113 (1965). Nor was it intended to address the statutory limitations, e.g. on considering "general project effects" described in section 20(2) of the UCPA, MCL 213. 70. See *Spiek v Michigan Dep't of Transportation*, 456 Mich 331; 572 NW2d 201 (1998).

constitutes an abuse of discretion. The Owners' evidence of costs-to-cure damages, absent proof of the amount of the damages to be mitigated, was legally inadmissible.

In the Court of Appeals, the Owners argued that MDOT failed to preserve this issue for appeal. If this Court agrees, a different standard of review applies.

On March 7, 2001, MDOT filed a Motion in Limine to Bar the Appraisals, Opinions and Conclusions of Defense Experts James Fuller and Timothy Laurencelle on the basis that they utilized a legally impermissible "cost-to-cure" analysis. [MDOT's Apx 1b-20b]. MDOT sought to bar the Owners from offering evidence of the alleged cost-to-cure without first determining the value of the remaining property before and after the taking.

The trial court heard argument and on March 29, 2001, one day before trial began, stated on the record in regard to MDOT's Motion in Limine to Bar Defendants' Cost-to-Cure Analysis:

> **The Court**: That – I just want to make sure. **That motion on the Defendants' Cost-to-Cure**, as the Court will see, **Defendants' motion is denied**. [Tr, 3/29/01, p 6; Owners' Apx 120a, emphasis added.]

The trial court confused its references. The "motion on the Defendants' Cost-to-Cure" was filed by Plaintiff, MDOT. There was no motion on Defendants' cost-to-cure, other than the one filed by MDOT. The Court apparently misspoke, or the court reporter erroneously transcribed, that "**Defendants**' motion is denied." The obvious intent was to deny Plaintiff's (MDOT's) motion on "Defendants' Cost-to-Cure."

The instant case was consolidated with *MDOT v Sehn Family Novi Limited Partnership, et al*, Oakland County Circuit Court No. 96-521477-CC for purposes of discovery. In his Brief in Response to MDOT's Motion for Summary Disposition, p 2 in *Sehn*, the Owners' legal

counsel, Mr. Ackerman, certified[14] that MDOT's motion on the Defendants' cost-to-cure in the instant case had been denied, as follows:

> This motion is essentially identical to a motion addressed by Judge Barry Howard in the case of *MDOT v Haggerty Corridor Partners Limited Partnership,* Case No. 95-509518-CC. **In the *Haggerty Corridor Partners* case, the same challenges to the defendants' valuation methods were asserted in a "Motion in Limine** to Bar the Appraisals, Opinions, and Conclusions of Defense Experts, Jim Fuller and Timothy Laurencelle on the Basis that They Utilized a Legally Impermissible, 'Cost-To-Cure' Analysis." **Judge Howard denied that Motion.** [Attachment, Court of Appeals Reply Brief; MDOT's Apx 52b, emphasis added.]

Judge Barry Howard was the trial court judge on both cases until retiring in April 2001. Both parties tried this case with the understanding that Judge Howard had denied MDOT's motion.

It is true, however, that no order was entered by the trial court denying MDOT's motion. In the heat of trial that omission was apparently overlooked. This Court could conclude that, while MDOT raised the issue, it did not do all that it should have done to preserve it for appeal. But, this Court may consider issues that were not even raised at trial. *Blackwell v Citizens Ins Co of America,* 457 Mich 662, 673-674; 579 NW2d 889 (1998). In *Wischmeyer v Schanz*, 449 Mich 469, 483; 536 NW2d 760 (1995), this Court held: "Under MRE 103, we review unpreserved error and reverse only if the substantial rights of a party are affected." MDOT has shown that not only did it raise the cost-to-cure issue by motion, and both parties believed that motion had been denied, but substantial rights of the public have been affected; the Owners were allowed to obtain a compensation award of many millions of dollars, completely unsupported by the law.

B. Analysis

In *Van Elslander, supra,* this Court adopted the dissenting opinion of Court of Appeals Judge Bandstra (who was in the majority in the Court of Appeals panel below), including the

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[14] As provided in MCR 2.114(D)(2), "The signature of an attorney . . . constitutes a certification . . . that . . . to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact. . . ."

explanation of costs-to-cure damages in *Dep't of Transportation v Sherburn,* 196 Mich App 301, 305; 492 NW2d 517 (1992):

> Where severance damages have occurred, it may sometimes prove possible for the property owner to perform certain actions upon the property to rectify the injuries in whole or in part, thus decreasing the amount of severance damages and correspondingly increasing the parcel's market value. These actions constitute a "curing" of the defects, and the financial expenditures to do so constitute the condemnee's cost to cure. [460 Mich at 130].

Consistent with *VanElslander*, the Court of Appeals below described costs-to-cure:

> [W]here, as here, a partial taking occurs, it is possible for the property not taken (the remainder) to suffer damages attributable to the taking. These damages have been described as "**severance damages**," which **may be measured by calculating the difference between the market value of the property not taken before and after the taking**. [Op, p 4; Owners' Apx p 547a, emphasis added.]

The Court of Appeals added: "an owner may only recover 'cost-to-cure' damages to the extent that they do not exceed the diminution in the value of the remainder parcel." *In re Widening of Fulton Street*, 248 Mich 13, 23; 226 NW 690 (1929) also held, that where the costs-to-cure fail to actually mitigate severance damages, evidence of the costs-to-cure are "immaterial and irrelevant;" the condemnor is "entitled to have the damages minimized." The Court below recognized that since the Owners had offered no evidence of the value of the remainder after the taking "as is," it was not possible to apply the standards of *VanElslander* and *Sherburn* for costs-to-cure. [Op, pp 4-5, Apx 547a-548a]. That decision was fully consistent with *VanElslander*.

As shown in the Counter-Statement of Facts, *supra*, pp 4-5, the Owners' dollar remainder values were calculated by first – and abstractly – calculating so-called costs-to-cure, and subtracting those figures from the purported before value of the remainder. The Owners never answered the simple question: What would the remaining 284 acres be worth if no cures were made – if the property were simply sold "as is"? If the severance damages only reduced the value of the remaining property by, e.g., $5,000,000, it would not be permissible to seek

$9,360,000 to mitigate those damages. But the Owners' method of calculating the after remainder value (subtracting the amount of the costs-to-cure from the before value of the remainder) mathematically guarantees that costs-to-cure will never exceed the severance damages. In fact, the costs-to-cure will always precisely equal the "severance damages."

The Owners admitted: "The just compensation award, plus the value of the remainder after the taking, should equal the value of the whole parcel before the taking." [Application for Leave to Appeal, p 24]. In this case, the "just compensation award" is the cash to be paid for the part taken, plus the costs-to-cure. The Owners were awarded $14,877,000 in just compensation. Since the "as is" value of the remainder was never calculated, there is no way to know whether adding the $14,877,000 "just compensation" awarded, to "the value of the remainder after the taking," equals or greatly exceeds the alleged "value of the whole parcel before the taking," $57,300,000. It is simply **impossible** to know whether the alleged costs-to-cure did, or did not, mitigate damages to the remainder.

Allowing the compensation to be determined based on costs-to-cure, without the "as is" value of the after remainder being in evidence, was legally erroneous, clearly prejudicial, clearly inconsistent with substantial justice, and reversible error.

CONCLUSION

The trial court denied MDOT a fair trial. Were MDOT to pay the jury verdict today, it would cost approximately $30 million, including interest, attorney fees and other costs. Valued as it was actually zoned, for residential use, the property taken was worth no more than $2,758,000. Any increase would be based on a premium for the possibility of rezoning or proven severance damages. But the trial court misinterpreted the law, made erroneous rulings, and prevented the jury from fairly considering all relevant and admissible evidence, and only such evidence, to determine just compensation. The rulings ineluctably led the jury to assume that rezoning was a certainty and to require MDOT to compensate the Owners for the increase in property value caused by MDOT's highway project. Whatever sum MDOT will ultimately pay, it should be decided after a trial in which both parties are given the opportunity to fairly present their evidence, with the jury being correctly instructed on the governing principles of law.

This case does not present novel issues; it may be resolved by applying settled law. Nonetheless, an opinion of this Court would be useful to the bench and bar by emphasizing that in condemnation cases, just as in civil cases generally, the trial courts must faithfully perform their role as gatekeeper, admitting relevant evidence on an evenhanded basis, consistent with established principles of eminent domain law. To the extent that standard jury instructions, such as M Ci JI 90.19, do not accurately reflect current law, they should not be given. *Wayne County v Britton Trust*, 454 Mich 608, 620-621; 563 NW2d 674 (1997)[15].

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[15] Prior to the 1963 constitution the jury served as "judges both of the law and the fact." *In re Widening of Bagley Ave*, 248 Mich 1, 4; 226 NW 688 (1929). Practices and jury instructions that are founded on the former law should no longer be followed unless they conform to current law. The "proper procedure to be followed in condemnation cases must accord with that in other judicial proceedings. " *Consumers Power Co v Allegan State Bank*, 388 Mich 568, 571; 202 NW2d 295 (1972). "All laws and court rules applicable to civil actions shall apply to condemnation proceedings except as otherwise provided in this act." MCL 213.52.

RELIEF SOUGHT

WHEREFORE, MDOT asks that this Honorable Court peremptorily affirm the decision of the Court of Appeals, or, after oral argument, affirm that decision or otherwise rule that the jury verdict will remain vacated and remand this matter for a new trial.

Respectfully submitted,

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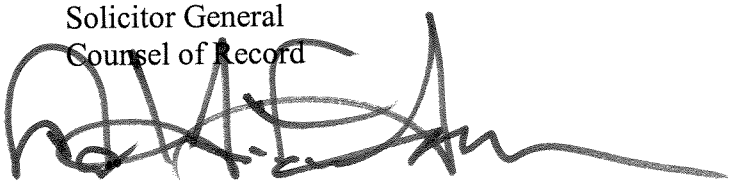

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